United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2478

To be argued by
MICHAEL Q. CAREY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2478

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

PETER BECKERMAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

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Preliminary Statement

Peter Beckerman appeals from an order entered on October 30, 1974 in the United States District Court for the Southern District of New York by the Honorable Constance Baker Motley, United States District Judge, denying, after a hearing, his motion to dismiss the indictment on the ground of double jeopardy.

Indictment 73 Cr. 939, filed on October 4, 1973, charged Beckerman in a single count with distributing and possessing with the intent to distribute approximately 28.04 grams of cocaine in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Trial commenced on May 8, 1974 before Judge Motley and a jury. On May 10, after the jury stated in a note that they were deadlocked, Judge Motley declared a mistrial.

On September 4, 1974, Beckerman moved to dismiss the indictment on the ground of double jeopardy. Judge Richard Owen, to whom the case had been reassigned on July 1, 1974, referred the motion to Judge Motley for decision. After a hearing on September 27, 1974, Judge Motley denied the motion in an oral opinion from the bench. A written order denying the motion was filed on October 30, 1974.

Statement of Facts

Beckerman was charged in a single count indictment with possessing approximately one ounce of cocaine with intent to distribute. When he took the witness stand, appellant admitted possessing the drug, but asserted an entrapment defense.

The Government called only three witnesses and presented its case in approximately 4¼ hours, beginning at approximately 3:15 P.M. on May 8, resuming testimony at approximately 11:15 A.M. on May 9 and resting its case at approximately 2:30 P.M. on May 9th after a luncheon recess of 1¼ hours (H. 6-7).*

Beckerman testified in his own behalf, called four other witnesses and rested his case after approximately 5¼ hours of testimony (H. 7-8).**

The jury began deliberating at approximately 2:35 P.M., May 10, 1974 (Tr. 484).***

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* Citations preceded by "H" refer to the pages of the transcript of the hearing on Beckerman's double jeopardy motion before Judge Motley on September 27, 1974.

** The time taken by the Government and the defense to present its case is based on the assumption, since the record does not reflect the time, that trial was recessed on May 8 and 9 at 5:30 P.M. and that the jury was given a luncheon recess of one hour on May 10.

*** Citations preceded by "Tr." refer to pages of the transcript of trial of Peter Beckerman on May 8-10, 1974.

Approximately ¾ of an hour later, at 3:20 P.M., the jury sent its first note to the Court. The Court then repeated its instructions on entrapment and the inference to be drawn, if any, from either the Government's or the defendant's failure to call Mary Adler, the informant (Tr. 485-493).

Approximately three hours after they began their deliberations, the jury sent its second note to the Court (Tr. 493). As a result, the testimony of Government witnesses Special Agents Irwin Lightcap and Samuel Meale, Beckerman and defense witness Linda Burns, concerning telephone calls by or to Mary Adler and Beckerman on September 18, 1973 was read to the jury (Tr. 494-495).*

At 6:30 P.M. the Court declared an evening recess for dinner. Deliberations resumed at 8:00 P.M.

At approximately 9:15 P.M., nearly 5½ hours after they had begun their deliberation, excluding the 1½ hour dinner recess, the jury sent a third note to the Court. It read: "We the jury are deadlocked" (Tr. 495-496). Judge Motley read the note to counsel and stated ". . . I gather [the note] means they can't reach a verdict so we will bring them in" (Tr. 496). The Government immediately requested a modified *Allen* charge and remarked that the jury had only been deliberating in the jury room for slightly over three hours, exclusive of the time during which testimony was read to them (Tr. 496). Defense counsel said nothing in support of the Government's request nor, for that matter, anything at all before the jury was brought in. Judge Motley refused to give an *Allen* charge, and stated that she considered as part of the deliberation the period of time when parts of the charge and testimony were read to the jury (Tr. 496-497).

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* Mary Adler did not tsetify at the trial.

When the jury returned to the courtroom, the following occurred:

"The Court: Ladies and gentlemen I have your note which reads, 'We the jury are deadlocked.'

Does that mean that you are not able to reach a verdict, and the question I want to put to you is whether you feel with a little more time you might be able to reach a verdict?

The Forelady: It is very hard to say. We are all very tired at this time and our biggest problem is we don't think we have enough evidence and this is our biggest hassle and maybe another time, another day we may be clearer.

The Court: The question I asked you was whether you thought with more time you would be able to reach a verdict, so the answer is no, is that it?

The Forelady: The way it seems now, it doesn't seem as though we will be able to.

Mr. Polstein: May I make a suggestion?
The Court: No, you may not.

Thank you very much. The Court is going to declare a mistrial, the jury is excused.

We have arranged for a bus to take you home.

Are they going to be here at 10:00 o'clock?

The jury is excused." (Tr. 497-498.)

Judge Motley's and the forelady's conclusion that the jury could not reach a verdict was unchallenged by any juror and no juror requested further time to deliberate.

After the jury was discharged, defense counsel requested that the Court charge the jury on quantum and burden of proof. Judge Motley merely repeated that the jury was dismissed (Tr. 498). Defendant never expressly objected to Judge Motley's decision.

At the September 27, 1974 hearing on Beckerman's motion, defense counsel conceded that the trial was short and simple and that there was only one issue for the jury (H. 5, 9). Judge Motley denied Beckerman's motion on the grounds, *inter alia,* that this was a short, one count, one defendant case; that the "deadlock" note was read to and discussed with counsel; that only the Government requested further deliberations; that defense counsel did not object to a mistrial but remained silent indicating his assent and that the jury indicated that with additional time it would not be able to reach a verdict (H. 34-36).

ARGUMENT

POINT I

The order denying the motion to dismiss the indictment is not appealable and this appeal should be dismissed for lack of jurisdiction.

Appellant's brief conspicuously omits any discussion of the threshold question of whether the order denying the motion to dismiss the indictment on the ground of double jeopardy is an appealable, "final" decision within this Court's appellate jurisdiction as defined in 28 U.S.C. § 1291. It is respectfully submitted that under the established law in this Circuit, an appeal from such an order is not permitted and that accordingly this appeal should be dismissed for lack of jurisdiction.

Traditionally, claims of double jeopardy based on an alleged improper declaration of a mistrial, such as the one raised here, have awaited appellate review until after the defendant has been convicted upon retrial. See, *e.g.*, *Illinois* v. *Somerville*, 410 U.S. 458, 460 (1973); *Downum* v. *United States*, 372 U.S. 734, 735 (1963); *Gori* v. *United States*, 367 U.S. 364, 365 (1961); *United States* v. *Glover*,

Dkt. No. 74-1739 (2d Cir., October 4, 1974), slip op. 33, 34-35; *United States* v. *Cording,* 290 F.2d 392, 393 (2d Cir. 1961).

This Court has repeatedly and unequivocally held that an order denying a motion to dismiss an indictment—even if based on a constitutional claim—is not appealable. *United States* v. *Garber,* 413 F.2d 284, 285 (2d Cir. 1969); *United States* v. *Foster,* 278 F.2d 567, 568-69 (2d Cir.), *cert. denied,* 364 U.S. 834 (1960); *United States* v. *Golden,* 239 F.2d 877, 878-79 (2d Cir. 1956); see also *United States ex rel. Rosenberg* v. *United States District Court,* 460 F.2d 1233 (3d Cir. 1972). Such orders do not constitute a "final decision" in a criminal case from which an appeal may be taken. See *Parr* v. *United States,* 351 U.S. 513 (1956); *Berman* v. *United States,* 302 U.S. 211 (1937); see also *DiBella* v. *United States,* 369 U.S. 121 (1962); *Cobbledick* v. *United States,* 309 U.S. 323 (1940); *Cogen* v. *United States,* 278 U.S. 221 (1929); *Heike* v. *United States,* 217 U.S. 423 (1910).

Furthermore, this Court has held that an appeal does not lie from the declaration of a mistrial and the order of a new trial where the jury has been unable to reach a verdict. *United States* v. *Kaufman,* 311 F.2d 695, 698-99 (2d Cir. 1963); *United States* v. *Ford,* 237 F.2d 57, 67 (2d Cir. 1956), *vacated as moot,* 355 U.S. 38 (1957); Accord: *United States* v. *Carey,* 475 F.2d 1019, 1021 (9th Cir. 1973); *United States* v. *Rizzo,* 439 F.2d 694 (3rd Cir. 1971); *Northern* v. *United States,* 300 F.2d 131, 132 (6th Cir. 1962); *Mack* v. *United States,* 274 F.2d 582, 583-84 (D.C. Cir.), *cert. denied,* 361 U.S. 916 (1959); *Gilmore* v. *United States,* 264 F.2d 44, 45-47 (5th Cir.), *cert. denied,* 359 U.S. 994 (1959); *United States* v. *Swidler,* 207 F.2d 47 (3rd Cir.), *cert. denied,* 346 U.S. 915 (1953).

In *United States* v. *Kaufman, supra,* the defendant Kaufman was found guilty by a jury on two counts of a

three count indictment. The jury was unable to reach a verdict on the third count against him, and the district court declared a mistrial as to that count. Dismissing the appeal on the third count, this Court declared:

> "The jury was unable to agree on the guilt or innocence of defendant Kaufman on the conspiracy count, and a mistrial was declared. Kaufman here seeks to have us rule that the evidence was insufficient to go to the jury on that count. However, his contention that the conspiracy count should have been dismissed is premature. *The declaration of a mistrial is not a final judgment and is not appealable at this time.*" (311 F.2d at 698-99; emphasis added).

In *United States* v. *Ford, supra*, the defendant was tried before a jury on a five count indictment charging income tax evasion. The jury found him guilty on three counts, acquitted him on one count, but was unable to reach a verdict on the first count of the indictment. Following the stalemate on that count, the district judge directed a verdict of acquittal on that count. After the defendant moved for acquittal on all counts or, in the alternative for a new trial, he vacated his previous directed verdict of acquittal. On appeal, the defendant argued that if he were retried on that count, he would be placed in double jeopardy. This Court dismissed the appeal as to that count, stating:

> "Since the order is interlocutory and the defendant has not yet been placed in jeopardy thereunder, the issue is not currently appealable and the pending appeal as to Count 1 must accordingly be dismissed." 237 F.2d at 67.

Kaufman and *Ford*, read together with this Court's decisions on the non-appealability of orders denying motions to dismiss an indictment, indisputably establish that the instant appeal should be dismissed.

The only decision holding that an appeal is available in a case such as this is *United States* v. *Lansdown*, 460 F.2d 164, 170-72 (4th Cir. 1972), subsequently cited with approval in *dicta* in *United States ex rel. Russo* v. *Superior Court*, 483 F.2d 7, 11 (3rd Cir.), *cert. denied*, 414 U.S. 1023 (1973). *Lansdown* held that an order denying a motion to dismiss an indictment on the ground of double jeopardy was a final appealable order under the collateral order doctrine set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Lansdown* is premised on the view that appellate review upon conviction after retrial is insufficient to guarantee the defendant "the full protection of the Fifth Amendment since he has been subjected to the embarrassment, expense, anxiety and insecurity involved in the second trial." 460 F.2d at 171. According to this view, if the defendant is denied appellate review when his motion to dismiss is denied, "the right claimed will be irreparably lost." *Id.* at 171 n. 7.

Lansdown, we submit, is not only directly contrary to the established law in this Circuit with respect to the appealability of orders denying dismissal motions and declarations of mistrial, but also its analysis is neither convincing nor correct. Its rationale is virtually identical to the argument of the defendant advanced in *Gilmore* v. *United States, supra*,* which the Fifth Circuit irrefutably demonstrated was wholly without merit:

> ". . . But even if it were assumed that the second trial was forbidden as double jeopardy, that does not invest us with jurisdiction to vindicate such right. The Constitution does not guarantee an appeal. That comes wholly from the statute. There are many instances in which it is ultimately determined that constitutional rights have been violated.

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* *Gilmore* was cited with approval by this Court in *United States* v. *Kaufman, supra*, 311 F.2d at 699.

But the nature of the asserted right, *i.e.,* a constitutional one, does not distinguish appellate review of other rights, whether statutory or common law, or from a procedural rule. At least so long as a criminal case is pending, review of such matters, as for example, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome. This is so even though, at the end of that trial, or an appeal from the judgment of conviction, it is ultimately determined that the violation of the constitutional right compels an acquittal. When that is the outcome, the individual accused may claim in a very real sense to have been subjected to a trial that ought never to have taken place. Congress might, as it has recently done in a very limited way for civil matters, 28 U.S.C.A. §1292(b), provide for interlocutory appeals to test such questions prior to trial and a final judgment in the traditional sense. Until Congress does so, the individual affected is witness to the fact that, "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 1940, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783.

The Constitutional right or the asserted violation of it, does not bridge the gap of appellate statutory jurisdiction. Nor, for like reasons, does it, through some reverse process, expand the term 'final decision' into something which, contrary to a long-settled Congressional policy, amounts in actuality to piecemeal review.

Appeal dismissed." (264 F.2d at 46-47; footnote omitted).

POINT II

Judge Motley did not abuse her discretion in declaring a mistrial after the jury announced it was deadlocked.

Beckerman contends that his Fifth Amendment right not to "twice be put in jeopardy" would be infringed by a retrial of the indictment. Appellant, however, has failed to demonstrate, as he must on this appeal, that the District Judge abused her discretion when she declared a mistrial, *sua sponte,* upon receiving a note from the jury that they were "deadlocked" and when she justifiably believed that defense counsel by his silence had implicitly consented to that decision. *Illinois* v. *Somerville, supra,* 410 U.S. at 461, 462; *United States* v. *Jorn,* 400 U.S. 470, 480-481, 486 (1971); *United States* v. *Perez,* 22 U.S. (9 Wheat 579-580) 256 (1824); *United States* v. *Goldstein,* 479 F.2d 1066, 1068 (2d Cir.), *cert. denied,* 414 U.S. 873 (1973).

The jury's final note to the Court read simply and unambiguously: "We the jury are deadlocked" (Tr. 496). Beckerman argues that Judge Motley abused her discretion in declaring a mistrial because the jury was on the verge of a verdict of acquittal (Br. 14-19).* Nothing in the record supports this purely speculative argument. On the contrary, the deadlock note as well as the forelady's answers to Judge Motley's questions indicate that the jury was unable to reach *any* verdict. Beckerman also argues that the record is barren of any facts establishing "manifest necessity" (Br. 14). However, the inability of the jury to agree on a verdict is the "classic example" of

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* Citations precluded by "Br." refer to the pages of the appellant's brief.

"manifest necessity" and fully justified Judge Motley's declaration of a mistrial. *Downum* v. *United States*, *supra*, 372 U.S. at 736; *United States* v. *Perez*, *supra*, 22 U.S. (9 Wheat at 580) at 256; *United States* v. *Glover*, *supra*, slip op. at 38; *United States* v. *Goldstein*, *supra*, 479 F.2d at 1068; *United States* v. *Castellanos*, 478 F.2d 749, 751 (2d Cir. 1973); *United States* v. *Cording*, *supra*, 290 F.2d at 393.

Judge Motley, as the trial judge, was best situated intelligently to decide if "manifest necessity" dictated a mistrial, *Gori* v. *United States*, *supra*, 367 U.S. at 368; *United States* v. *Goldstein*, *supra*, 479 F.2d at 1068; and her exercise of the broad discretion she possesses to declare a mistrial, *Illinois* v. *Somerville*, *supra*, 410 U.S. at 462; *United States* v. *Goldstein*, *supra*, 479 F.2d at 1068, is reviewable only for abuse of discretion. *United States* v. *Goldstein*, *supra*, 479 F.2d at 1078; *McKissick* v. *United States*, 379 F.2d 754, 760 (5th Cir. 1967).

Beckerman's claim that Judge Motley abused her discretion is based on the colloquy between herself and the forelady of the jury concerning the possibility of the jury reaching a verdict. He totally disregards the jury's unequivocal deadlock note. Clearly, taking all the circumstances into consideration, *United States* v. *Perez*, *supra*, 22 U.S. (9 Wheat at 579) at 256; *United States* v. *Goldstein*, *supra*, 479 F.2d at 1064, Judge Motley did not abuse her discretion in declaring the mistrial.

Beckerman argues that Judge Motley abused her discretion because she relied upon the brevity of the trial and the simplicity of the factual issues (Br. 12). These were only two of the factors which she considered. Beckerman here ignores not only the deadlock note, but also the colloquy between Judge Motley and the forelady. The declaration of a mistrial, based on the note and the forelady's oral statement following 5½ hours of deliberation, in the context of this short, simple case involving only one defendant,

one count and one issue, constituted a wholly proper exercise of the district court's discretion. *Logan* v. *United States,* 144 U.S. 263, 297-98 (1892); *United States* v. *Perez, supra,* 22 U.S. (9 Wheat at 579) at 256; *United States* v. *Goldstein, supra,* 479 F.2d at 1068-69; *United States* v. *Cording, supra,* 290 F.2d at 393.

This Court has held that there was no abuse of discretion when a trial judge declared a mistrial in a three count, one defendant case charging the sale of heroin, where the jury reported itself unable to agree and not likely to agree on a verdict after less than four hours of deliberations. *United States* v. *Cording, supra,* 290 F.2d at 393.

The declaration of a mistrial also has been held proper in cases far more complex than this one, where, after a short period of deliberation, the jury reports itself unable to agree and not likely to agree on a verdict, and the judge concludes, as Judge Motley did here, that the jury is indeed unable to reach a verdict. *United States* v. *Goldstein, supra,* 479 F.2d 1068-69. In *Goldstein,* five defendants were charged with 20 counts of violating the internal revenue laws and with conspiring to do so, the trial was one month long, the evidence and factual issues were complex and the jury had deliberated only eight hours even though there were almost fifty possible verdicts to render and no indication that agreement was impossible as to all. *United States* v. *Goldstein, supra,* 479 F.2d at 1062, 1068.

Beckerman never expressly objected to a mistrial whereas Judge Motley found that the Government had.* The District Court construed Beckerman's silence as agreement with its view that the jury had deliberated long enough (H. 35). Judge Motley was justified in construing Beck-

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* Judge Motley's finding was apparently based on the Government's request for an *Allen* charge.

erman's silence as implied consent to the declaration of a mistrial, and his consent forecloses any objection to a mistrial on the ground of double jeopardy. *Cf. United States* v. *Goldstein, supra,* 479 F.2d at 1066. In any event, Beckerman's failure to make an express objection, his failure to support the Government's request for an *Allen* charge and his total silence while the deadlock note was reviewed with counsel and when Judge Motley concluded the note meant the jury could not reach a verdict must be deemed to constitute knowing and deliberate acquiescence in Judge Motley's decision. Clearly, Beckerman's claim of abuse of discretion is the product of hindsight.

Beckerman would have this court believe that before Judge Motley excused the jury, he requested an additional charge on quantum of proof, thereby implicitly objecting to a mistrial (Br. 18). This is a gross distortion of what occurred. Judge Motley twice said the jury was discharged before Beckerman requested any additional charge (Tr. 498).* Clearly she did not abuse her discretion since the decision to discharge the jury is reviewed on the basis of the facts as they existed before, not after, the order discharging the jury is given. *See, e.g., United States* v. *Cording, supra.* By the time Beckerman did request additional instructions, Judge Motley had already found that the jury was genuinely deadlocked. If Judge Motley had ordered the jury to deliberate further, she might have coerced an erroneous verdict and thereby defeated the cause of public justice. *United States* v *Goldstein, supra,* 479 F.2d at 1068.

Beckerman inexplicably speculates that the jury was on the verge of a verdict of acquittal (Br. 14-17), despite the

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* Beckerman did offer to make a suggestion before Judge Motley said the jury was excused (Tr. 498). By no means, however, can this be construed as a request for additional instructions to the jury.

forelady's statement that it didn't seem like they could reach a verdict, and he relies heavily upon *United States* v. *Lansdown, supra,* as authority that, accordingly, Judge Motley abused her discretion in declaring a mistrial (Br. 13). *Lansdown* is inapposite. In *Lansdown* the judge brought the jury into the courtroom when he felt they had deliberated long enough, concluded the jury was hopelessly deadlocked because they had not yet reached a unanimous verdict and declared a mistrial despite the jury foreman's statement that the jury was on the verge of a verdict and defense counsel's and a juror's request for more time to deliberate. *United States* v. *Lansdown, supra,* 460 F.2d at 167, 168. By contrast, in this case, the jury expressed in a note that it was deadlocked; Judge Motley called them into the courtroom for that reason; no juror challenged Judge Motley's or the forelady's conclusion that it seemed with more time they still would not reach a verdict and neither defense counsel nor a juror expressly requested more time to deliberate.

In reliance on *United States* v. *Jorn, supra,* Beckerman charges Judge Motley abused her discretion by allegedly abruptly discharging the jury (Br. 14, 15, 18). In *Jorn,* the court declared a mistrial after the first witness was called but before direct examination commenced in order to give Government witnesses the opportunity to consult with counsel regarding their constitutional rights. The Court of Appeals found the trial court had abused its discretion in declaring a mistrial without considering the possibility of a continuance or giving either Government or defense counsel an opportunity to suggest a course of action other than discharging the jury. *United States* v. *Jorn, supra,* 400 U.S. at 473, 486, 487. Here, however, Judge Motley gave Beckerman's counsel ample opportunity before the jury was called into the courtroom to object to a mistrial or to suggest some other alternative. Judge Motley read the jury's "deadlock" note to counsel before the jury was brought in, interpreted it for counsel as meaning that the jury could not reach a verdict, heard the Gov-

ernment's argument for a modified *Allen* charge and stated her reasons for refusing it. She, thereby, plainly declared her intention to discharge the jury. *Cf. United States* v. *Goldstein, supra,* 479 F.2d at 1066. Defense counsel, who had raised objections regularly and often throughout the trial, said nothing, and his argument that he had no opportunity to object to a mistrial or suggest another course of action simply is unsupported by the facts.

Beckerman argues that Judge Motley declared a mistrial, not because, as the record indicates, the jury was genuinely unable to reach a verdict, but because she intended to benefit the Government by giving it the opportunity to call Mary Adler at a retrial (Br. 15-17). This argument is premised on the unfounded assumption not only that the jury was on the verge of a verdict of acquittal but that Judge Motley for some unexplained reason knew that what allegedly troubled the jury was the Government's failure to call the informant, Mary Adler, who the defense argued had entrapped appellant. The declaration of a mistrial which, coincidentally, gives the Government the opportunity to call an additional witness at a retrial does not constitute an abuse of discretion on the part of the court where the record shows the decision to declare a mistrial was reached after the case was given to the jury and was based on factors beyond the court's control, namely the inability of the jury to reach a verdict. *Cf. United States* v. *Glover, supra,* slip op. at 37-39.

Defendant also argues that Judge Motley could have granted the Government's request for an *Allen* charge or further instructed the jury on the burden of proof. However, even if the decision to refuse to give additional instructions were error (and it was not), such error did not infect the trial court's exercise of its discretion in discharging the deadlocked jury. *United States* v. *Berniker,* 439 F.2d 686, 687 (9th Cir.), *cert. denied,* 404 U.S. 938 (1971).

Finally, Beckerman argues that Judge Motley should have polled the jury to determine if it was deadlocked and if it could reach a verdict if allowed more time to deliberate (Br. 19-20). Beckerman never requested Judge Motley to poll the jury, though he had the opportunity to do so, and having waived that right, he is precluded from raising the issue for the first time on appeal. *United States* v. *Nooks*, 446 F.2d 1283, 1290 (5th Cir.), *cert. denied sub nom. Hughes* v. *United States*, 404 U.S. 945 (1971); *United States* v. *Mass*, 428 F.2d 614, 615 (7th Cir. 1970); *Mull* v. *United States*, 402 F.2d 571, 574 (9th Cir. 1968), *cert. denied*, 393 U.S. 1107 (1969); *United States* v. *Neal*, 365 F.2d 188, 190 (6th Cir. 1966).

CONCLUSION

The appeal should be dismissed or, in the alternative, the order of the District Court denying the motion should be affirmed.

Respectfully submitted,

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Assistant United States Attorneys,
Of Counsel.

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Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL Q. CAREY being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29TH day of JANUARY, 1975, he served a copy of the within BRIEF FOR THE USA by placing the same in a properly postpaid franked envelope addressed:

ROBERT POLSTEIN, ESQ.
ORANS, ELSEN & POLSTEIN
ONE ROCKEFELLER PLAZA
NEW YORK, NEW YORK 10020

And deponent further says that he sealed the said envelope and placed the same in the mail BOX drop for mailing OUTSIDE the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sworn to before me this

29TH day of JANUARY, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976